Supreme Court of the United States.

OCTOBER TERM, 1914. No.

WILHELM KNAUTH, OSCAR L. GUBELMAN, ROLLIN C. NEWTON, MARY W. KNAUTH, MAX JAFFE, AUGUST STERN, AREND H. WEINGARDT and PERCIVAL KUHNE, as survivors of themselves and FRIEDRICH NACHOD, deceased, formerly composing the firm of KNAUTH, NACHOD & KUHNE,

Petitioners,

against

EDMOND LATHAM, CHARLES LATHAM and RAOUL LATHAM, composing the firm of LATHAM & COMPANY; AMERICAN SURETY COMPANY OF NEW YORK; WILLIAM S. LOVELL, as Trustee in Bankruptcy of KNIGHT, YANCEY & COMPANY; and CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers in Bankruptcy of KNIGHT, YANCEY & COMPANY,

Respondents.

TO THE ABOVE NAMED COURT:

The petition of the petitioners above named, by Arthur von Briesen, Antonio Knauth, Thomas M. Stevens and George T. Hogg their counsel, respectfully represents:

1. On or about April 29, 1910, the respondents, Clarence E. Frost and William S. Lovell, as re-

ceivers in Bankruptcy of Knight, Yancey & Company, together with a creditor of said firm, filed their bill in equity in the United States Circuit Court for the Southern District of Alabama against the respondents, Latham & Company and others. The claim was that Knight, Yancey & Company had illegally transferred some 7800 bales of cotton to the respondents Latham & Company. The relief sought was that said transfer be set aside and the property delivered to the complainants and that, pending the hearing and determination of the suit, the property be impounded and sequestered by the Court. Thereafter and on or about May 4, 1910, a writ of sequestration was issued and some 4200 bales of said cotton were seized and held by the Marshal.

2. Thereafter, and on or about May 5, 1910, the complainants amended said bill as follows:

"NEW ALLEGATIONS.

"4-1/2. Your orators are informed and believe and on such information and belief charge that there are persons other than said Latham & Company who claim some right, title or interest in said seventy-eight hundred (7800) bales of cotton, or portions thereof, and that the names of such other persons, firms or corporations are unknown to these complainants; and that the nature of any such right, title or interest claimed in and to said seventy-eight hundred (7800) bales of cotton is unknown to these complainants."

NEW PRAYER.

"That all persons, firms or corporations who claim any right, title or interest in and to said seventy-eight hundred (7800) bales of cotton be made parties defendants to this bill and be cited by publication to answer this bill."

3. Thereafter and on or about May 14, 1910, the respondents Latham & Company were permitted by a decree of said court to withdraw said cotton and substitute in place thereof a forthcoming bond. Said bond was furnished by the respondents Latham & Company and American Surety Company of New York and, after it had been filed, the property was delivered to said Latham & Company.

4. Being thus called upon to do so, the petitioners, Knauth, Nachod & Kuhne, duly appeared in said suit and filed their answer, on or about July 1, 1910. By permission of the court they also filed a cross-bill (or whatever it should be called). By their said bill, the petitioners claimed that the bankrupts had obtained from them the sum of $98,005.58, by false representations, perpetrated by means of forged bills of lading; that certain bales of the cotton impounded and sequestered by the court were the proceeds of said money; and that Latham & Company were not takers either for value or without notice or in good faith. The relief sought was, in substance, that the property and the forthcoming bond, constituting the proceeds thereof in the possession of the court, be impressed with a trust or charge for the benefit of the petitioners. Said bill was of an original as well as of an auxiliary and ancillary character and jurisdiction was predicated on the ground that the said court had acquired exclusive dominion over and possession of the *res* and that this carried with it the jurisdiction and duty to hear and determine the rights of the petitioners, Knauth, Nachod & Kuhne.

5. Thereafter and on or about August 20, 1910, the respondent, William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company, was substituted in place of the original complainants and

permitted to file a supplemental bill. Thereafter and on or about December 20, 1910, said Knauth, Nachod & Kuhne were permitted to file an amended bill.

6. Thereafter and on or about March 21, 1911, a decree was made upon motion striking out the answer and bills of the petitioners, Knauth, Nachod & Kuhne, for want of jurisdiction, without regard to whether the question should have been presented by demurrer instead of by motion. In its opinion the court indicated that the petitioners' remedy was to present a claim to the bankruptcy court for any proceeds that the Trustee might recover. But this ignores the fact that the petitioners' claim is of a prior and paramount character and not dependent on the claim of the Trustee. Thereafter and on or about December 3, 1912, said decree was reversed by the United States Circuit Court of Appeals for the Fifth Circuit. (*Knauth, Nachod & Kuhne* vs. *Lovell et al.*, 200 Fed. Rep. 403, 404.)

7. Thereafter the respondents above named moved to dismiss the petitioners' bill, the grounds being briefly a want of jurisdiction and a want of equity. The district court, having succeeded the circuit court, heard said motions on the theory that they were authorized by the present Equity Rules and that the reversal of the previous decree rested on the fact that it had been stricken out on motion instead of dismissed on demurrer. The motions were granted, the court then indicating in its opinion that the petitioners' remedy was to follow the cotton to France. But this ignores the fact that the court had substituted a forthcoming bond therefor and that said bond constituted the proceeds thereof, the same as if the property had been sold and the money deposited in court.

8. Thereafter and on or about January 18, 1915, the decree dismissing the bill of the petitioners, Knauth, Nachod & Kuhne, was modified and affirmed and thereafter and on or about February 22, 1915, a petition for a rehearing was denied by the United States Circuit Court of Appeals for the Fifth Circuit and thereupon an assignment of errors was duly filed by the petitioners above named. Said Circuit Court of Appeals indicated in its opinion, as had the former circuit court on the first motion to strike out, that the petitioners' remedy was to present a claim to the bankruptcy court for any proceeds that the Trustee might recover. But, as above stated, this ignores the fact that the petitioners' claim is of a prior and paramount character and not dependent on the claim of the Trustee. It was expressly assumed by both of said courts on each motion and each appeal that, under the allegations of their bill, the petitioners could follow their money into the property impounded and sequestered by the court. The Circuit and District Courts held, however, that they were without jurisdiction to permit the petitioners to follow their money into said property and, on the last appeal, that ruling was affirmed. Three months have not elapsed since the entry of said judgment of affirmance.

9. The petitioners above named feel aggrieved and believe that the decree of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous and that this Court should require said case to be certified to it for its review and determination, in conformity with the provisions of the Acts of Congress in such cases made and provided.

WHEREFORE, the petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this Court, directed to the United States Cir-

cuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled *Knauth, Nachod & Kuhne, Appellants,* vs. *Latham & Company and others, appellees,* No. 2651, to the end that the said case may be reviewed by this court as provided in § 240 of the Federal Judicial Code, being the Act of Congress approved March 3, 1911, and § 4 of the Act of Congress amending the said Code, approved January 28, 1915; and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the said case be reversed, so far as the same affirms the decree dismissing the so called cross-bill of Knauth, Nachod & Kuhne, and that the case be then remitted to the United States District Court for the Southern District of Alabama to hear and determine the claim of said Knauth, Nachod & Kuhne upon the merits; and that the petitioners have such other, further and different relief as justice may require, in conformity with the law and procedure of the United States.

Dated March 31, 1915.

KNAUTH, NACHOD & KUHNE,
Petitioners.

ARTHUR V. BRIESEN,
Counsel for Petitioners,
25 Broad Street,
New York, N. Y.

ANTONIO KNAUTH,
THOMAS M. STEVENS,
GEORGE T. HOGG.
Of Counsel.

STATE OF NEW YORK, }
County of New York. } ss:

I, GEORGE T. HOGG, being duly sworn, say.:

I am one of counsel for the petitioners named in the foregoing petition and have prepared the same and am the counsel most familiar with the details of the matter; and that the allegations thereof are true as I verily believe.

GEORGE T. HOGG.

Sworn to before me this 31st }
day of March, 1915. }

FRED A. KLEIN,
Notary Public, Richmond County.
Certificate filed in New York County.

Motion for Certiorari.

SUPREME COURT OF THE UNITED STATES.

KNAUTH, NACHOD & KUHNE,
Petitioners,

against

LATHAM & COMPANY and others,
Respondents.

The petitioners appear, by Arthur von Briesen, Antonio Knauth, Thomas M. Stevens and George T. Hogg their counsel, and move the Court for the issue of a writ of *certiorari* or other proper process, directed to the United States Circuit Court of Appeals for the Fifth Circuit, requiring said court to certify to this court for its review and determination a certain cause, lately pending in said Court of Appeals, wherein the petitioners were appellants and the respondents were appellees, No. 2651; and, to that end, it tenders its petition and brief with a certified copy of the entire record in said cause in said Court of Appeals.

Briefly stated, the petitioners claim that the bankrupts, in whose place the respondents stand, obtained from petitioners the sum of $98,005.58 by false representations, perpetrated by means of forged bills of lading; that said money was converted into certain cotton, which was transferred by the bankrupts to the respondents Latham & Company; that, at the instance of the Receivers and a creditor of the bankrupts, said property was impounded and sequestered by the court; that the pe-

titioners were then called upon to present their claim to said property; that the Trustee was then substituted, in place of said receivers and creditor; that said property was then delivered to Latham & Company, upon their filing a forthcoming bond in place thereof; that the petitioners, being thus called upon to do so, presented their claim to said property; that the forthcoming bond in the possession of the court constituted the proceeds of said property, the same as if it had been sold and the proceeds deposited; that the jurisdiction of the court was exclusive and carried with it the jurisdiction and duty to hear and determine and enforce the claim of the petitioners; but that the petitioners' claim was then dismissed for want of jurisdiction and that the petitioners have thus been deprived of their property, without a hearing upon the merits and without due process of law.

The petitioners assume that this court will consider only the question of jurisdiction of the District Court to hear and determine and enforce the claim of the petitioners and, upon that assumption, concede that the question will not require extended argument and will consent, if *certiorari* be granted, that the cause be transferred to the summary docket for hearing as soon as a return can be made and printed.

ARTHUR V. BRIESEN,
Counsel for Petitioners,
25 Broad Street,
New York, N. Y.

ANTONIO KNAUTH,
THOMAS M. STEVENS,
GEORGE T. HOGG,
Of Counsel.

Notice of Motion.

SUPREME COURT OF THE UNITED STATES.

KNAUTH, NACHOD & KUHNE,
Petitioners,

against

LATHAM & COMPANY, and others,
Respondents.

WALKER B. SPENCER, CHARLES PAYNE FENNER, PHILIP S. GIDIERE, and ESMOND PHELPS, Counsel for respondents, Latham & Company and American Surety Company of New York.

AUGUSTUS BENNERS, Counsel for the respondents Trustee and Receivers.

PLEASE TAKE NOTICE that, on the petition of Knauth, Nachod & Kuhne, verified March 31, 1915, and a copy of the entire record in the cause, the foregoing motion will be submitted to the Supreme Court of the United States at Washington, D. C., on the 19th day of April, 1915, at the opening of the court on that day or as soon thereafter as counsel can be heard; and that, in support of said motion and petition, a brief of which the annexed is a copy will be submitted to the court.

Dated March 31, 1915.

ARTHUR v. BRIESEN,
Counsel for Petitioners,
25 Broad Street,
New York, N. Y.

ANTONIO KNAUTH,
THOMAS M. STEVENS,
GEORGE T. HOGG,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1914, No.

KNAUTH, NACHOD & KUHNE,
Petitioners,

vs.

LATHAM & COMPANY and others,
Respondents.

BRIEF FOR PETITIONERS.

Petition by the petitioners, the members of the firm of Knauth, Nachod & Kuhne, for the issue of a writ of *certiorari* to the United States Circuit Court of Appeals for the Fifth Circuit.

POINT I.

The property in question was not the property of the bankrupts and was not brought *in custodia legis* by the adjudication of bankruptcy. It had been transferred by the bankrupts to the respondents, Latham & Company, before bankruptcy. The conditions, on which said transfer is voidable, must be established and the transfer must be set aside before the property can become an asset of the bankrupt estate or be subject to the jurisdiction of the bankruptcy court.

Bankruptcy Act, §§ 60b, 67e, 70a (5), 70e.

Babbitt vs. *Dutcher*, *216, U. S. 102, 113*, and cases cited.

Hebert vs. *Crawford*, *228 U. S. 204, 209-210.*

In re Rathman, *183 Fed. Rep. 913, 927.* Cited in *Jones* vs. *Springer*, *226 U. S. 148, 155.*

In the case of *Lazarus* vs. *Prentice* (234 U. S. 263, 266), from which the Circuit Court of Appeals quoted, the lien in question was for attorneys' fees and it had been created after the commencement of bankruptcy proceedings and the appointment of a receiver and after ancillary proceedings had been instituted, for the extension of the receivership to the district where the property was located, and the property was seized in the possession of the bankrupts and their agents. In that case the jurisdiction of the bankruptcy court was exclusive because it had first attached. In this case the jurisdiction of the former circuit court was exclusive because it, and not that of the bankruptcy court, had attached.

POINT II.

The petitioners were not deprived of the right to follow their money into the property in question by the bankruptcy of Knight, Yancey & Company. Said right continued and the Trustee took subject thereto.

Eyster vs. *Gaff*, *91 U. S. 521, 525.*

Jaquith vs. *Rowley*, *188 U. S. 620, 623-624, 625-626.*

First Nat. Bank of Chicago vs. *Chicago Title & Trust Co.*, *198 U. S. 280, 289, 291.*

Hiscock vs. *Varick Bank of New York, 206 U. S. 28, 41.*

In re Rathman, 183 Fed Rep. 913, 925–928; 106 C. C. A. 253. Cited in *Jones* vs. *Springer.* (226 U. S. 148, 155).

Skilton vs. *Coddington, 185 N. Y. 80, 85.*

Reed vs. *Bullington, 49 Miss. 223, 225.*

POINT III.

The original suit was not merely to set aside a preferential transfer, as assumed by the Circuit Court of Appeals. It was also a suit to recover possession of the property itself and, in the meantime, to impound and sequester it. The distinction is material because the relief sought necessitated an exclusive dominion over the property and this carried with it the jurisdiction and duty to hear and determine the claim of the petitioners.

Krippendorf vs. *Hyde, 110 U. S. 276, 280, 282, 287.*

Morgan's La. and Tex. R. R. and Steamship Co. vs. *Tex. Cent. Ry. Co., 137 U. S. 171, 201.*

Farmers Loan & Trust Co. vs. *Lake Street Elevated R. R. Co., 177 U. S. 51, 61.*

Murphy vs. *John Hoffman Co., 211 U. S. 562, 569.*

Palmer vs. *Texas, 212 U. S. 118, 129.*

Rickey Land and Cattle Co. vs. *Miller & Lux, 218 U. S. 258, 262-263.*
Hebert vs. *Crawford, 228 U. S. 204, 207-208, 210.*

Possession also gave the court a right to sell and deposit the proceeds or, what is the same thing, to substitute a forthcoming bond therefor. The delivery of the property, on the deposit of its value or a bond therefor, transferred the claims of all parties to the deposit or bond as the proceeds of the property.

Jones vs. *Springer, 226 U. S. 148, 155, 157.*
First Nat. Bank of Chicago vs. *Chicago Title & Trust Co., 198 U. S. 280, 291.*

The remedy suggested by the Circuit Court of Appeals, that the petitioners can present a claim to the bankruptcy court is inadequate. The claim of the petitioners is prior and paramount to those of both the Trustee and Latham & Company. It is not subject to the conditions which attach to the claim of the Trustee. It is based on the fact that the property in question is the proceeds of their money and that Latham & Company were not innocent purchasers for value. (*Petition for Certiorari*, ¶4.)

POINT IV.

The right of the petitioners to follow their money into the property in question is well settled.

On the first appeal the Circuit Court of Appeals summarized the petitioners' bill as follows:

"The amended cross-bill sets up that Knight, Yancey & Co. obtained from the ap-

pellants $98,005.58 by means of forged bills of lading, and that the money of which they were defrauded was invested in the assets involved in the suit."

Knauth, Nachod & Kuhne vs. *Lovell, 200 Fed. Rep. 403, 404; 118 C. C. A. 555.*

The petitioners rely on a long line of authorities among which are the following:

3 Pom. Eq. Juris. (3d Ed.) §§ 1044, 1048, 1051, 1053, 1058.

Gorman vs. *Littlefield, 229 U. S. 19, 24-25;* and cases cited.

Hurley vs. *Atchison, T. & S. F. Ry. Co. 213 U. S. 126, 134.*

Oliver vs. *Piatt, 3 How. 333, 401, 409, 410.*

Butler vs. *Western German Bank, 159 Fed. Rep. 116, 117; 86 C. C. A. 306.*

Smith vs. *Township of Au Gres, Mich., 150 Fed. Rep. 257, 260; 80 C. C. A. 145.*

Lightfoot vs. *Davis, 198 N. Y. 261, 270-273, 274; and cases cited.*

Welch vs. *Polley, 177 N. Y. 117, 121, 122, 123.*

Muller vs. *Kling, 209 N. Y. 239, 244, 245*

POINT V.

The petitioners have been deprived of their property without due process of law.

U. S. Cons't'n, Amd't V.

Chicago, B. & Q. R. R. Co. vs. *Chicago, 166 U. S. 226, 233-234, 234-235.*

State of Washington ex Rel. O. R. R. and N. Co. vs. *Fairchild, 224 U. S. 510, 523-524.*

This necessarily follows from the fact that the property of the petitioners was impounded and sequestered and subjected to the exclusive jurisdiction of the Court; that the petitioners were called upon, as unknown claimants, to present their claim to said property; that the petitioners did present their claim; and that the claim of the petitioners was then dismissed without a hearing on the merits. Did the District Court have that power? "The question is to be determined not by what has been done under it in any particular instance, but what may be done under and by virtue of its authority."

Colon vs. *Lisk, 153 N. Y. 188, 194.*

Gilman vs. *Tucker, 128 N. Y. 190, 200.*

Stuart vs. *Palmer, 74 N. Y. 183, 188.*

The constitutional question was involved in the motions to dismiss for want of jurisdiction and raised by the first error assigned in the District Court. This was the way to raise it, under the present practice.

POINT VI.

The petitioners were duly admitted to the suit and permitted to file their bill. They were then entitled to have their claim heard and determined on the merits, whether they might have been refused admittance or not.

In re Mich. Cent. R. R. Co. 124 Fed. Rep. 727, 730; 59 C. C. A. 643.

Ill. Steel Co. vs. *Ramsey, 176 Fed. Rep. 853, 863, 866; 100 C. C. A. 323.*

Gay vs. *Hudson River Electric Co., 184 Fed. Rep. 689, 692-693; 106 C. C. A. 643.*

POINT VII.

The writ of *certiorari* should be granted.

Respectfully submitted March 31, 1915.

ARTHUR V. BRIESEN,
Counsel for Petitioners,
25 Broad Street,
New York, N. Y.

ANTONIO KNAUTH,
THOMAS M. STEVENS,
GEORGE T. HOGG,
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